



232925

PHYSICAL DOCUMENT

LPS-n232925-v1

CWA COMPLAINT

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Document Type: PLEADING

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Fileroom: LPS - Main Justice

DJ#:

Case Name:

Court: CA N.D. Cal.; 9th Cir.

Notes: SCANNED/UNASSIGNED

Double-Sided:

Received Date: 2/19/2014

Urgent:

Oversize:

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8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10 CALIFORNIA RIVER WATCH, a
11 501(c)(3) nonprofit public benefit
corporation,

12 Plaintiff,

13 v.

14 KEVIN J. LUNNY; DRAKES BAY
15 OYSTER COMPANY; DOES 1-30,
inclusive,

16 Defendants.
17 _____/

CASE NO. 3:14-cv-00598 LB

**CERTIFICATE OF SERVICE OF
COMPLAINT ON UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY AND UNITED STATES
DEPARTMENT OF JUSTICE**

DEPT. OF JUSTICE, ENE
ENVIRONMENTAL DIVISION

14 FEB 19 AM 1:47

22 //

26 //
27

1 CERTIFICATE OF SERVICE

2 I am employed in the County of Sonoma, State of California. I am over the age of
3 eighteen years and not a party to the within action. My business address is 100 E Street, Suite
4 318, Santa Rosa, CA 95404. On the date set forth below, I served the following described
document:

5 **COMPLAINT FOR INJUNCTIVE RELIEF, CIVIL PENALTIES, RESTITUTION**
6 **AND REMEDIATION [Environmental - Clean Water Act 33 U.S.C. § 1251 *et seq.*]**

7 on the following parties by placing a true copy in a sealed envelope, addressed as follows:

8 Citizen Suit Coordinator
9 U.S. Dept. of Justice
10 Environmental & Natural Resource Division
11 Law and Policy Section
12 P.O. Box 7415
13 Ben Franklin Station
14 Washington, DC 20044-7415

15 Administrator
16 U.S. Environmental Protection Agency
17 Ariel Rios Building
18 1200 Pennsylvania Avenue, N.W.
19 Washington, D.C. 20460

20 [X] (BY MAIL) I placed each such envelope, with postage thereon fully prepaid for first-class
21 mail, for collection and mailing at Santa Rosa, California, following ordinary business practices.
22 I am readily familiar with the practices of Law Office of Jack Silver for processing of
23 correspondence; said practice being that in the ordinary course of business, correspondence is
24 deposited with the United States Postal Service the same day as it is placed for processing.

25 [] (BY FACSIMILE) I caused the above referenced document(s) to be transmitted by Facsimile
26 machine (FAX) 707-528-8675 to the number indicated after the address(es) noted above.
27 2014

28 I declare under penalty of perjury, under the laws of the State of California, that the
foregoing is true and correct, and that this declaration was executed on February 10, 2014 at
Santa Rosa, California.

Wojciech P. Makowski
Wojciech P. Makowski

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5 Attorneys for Plaintiff
6 CALIFORNIA RIVER WATCH

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9 CALIFORNIA RIVER WATCH, a
10 501(c)(3) nonprofit public benefit
corporation,

11 Plaintiff,

12 v.

13 KEVIN J. LUNNY; DRAKES BAY
OYSTER COMPANY; DOES 1-30,
14 inclusive,

15 Defendants.

CASE NO.:

COMPLAINT FOR INJUNCTIVE RELIEF,
CIVIL PENALTIES, RESTITUTION AND
REMEDICATION

[Environmental - Clean Water Act
33 U.S.C. § 1251 *et seq.*]

16
17 NOW COMES plaintiff CALIFORNIA RIVER WATCH a 501(c)(3) nonprofit public
18 benefit corporation ("RIVER WATCH") by and through its attorneys, and for its Complaint
19 against defendants, KEVIN LUNNY, DRAKES BAY OYSTER COMPANY and DOES 1-30,
20 inclusive (collectively hereafter, "DBOC") states as follows:

21 **I. NATURE OF THE CASE**

22 1. This is a citizens' suit for relief brought by RIVER WATCH under the Federal Water
23 Pollution Control Act, also known as the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*,
24 specifically CWA §§ 301, 402, and 505, 33 U.S.C. §§ 1311, 1342 and 1365, to stop DBOC from
25 repeated and ongoing violations of the CWA. These violations are detailed in the Notice of
26 Violations and Intent to File Suit dated June 24, 2013 and Supplemental Notice of Violations
27 and Intent to File Suit dated August 6, 2013 (hereafter, "NOTICES") made part of this pleading
28 and attached hereto as EXHIBIT A.

1 2. As detailed in the NOTICES, DBOC is the responsible owner, operator and/or manager
2 of an oyster farm and shellfish processing facility located at 17171 Sir Francis Drake Boulevard
3 in Inverness, California ("Facility"). RIVER WATCH contends DBOC is routinely violating
4 the CWA by discharging pollutants, including biological materials and polluted wastewater,
5 from the Facility and various point sources within the Facility, to waters of the United States,
6 including Drakes Estero, without a National Pollution Discharge Elimination System ("NPDES")
7 permit, in violation of CWA § 301(a), 33 U.S.C. § 1311(a).

8 3. DBOC, operating as an animal aquiculture and shellfish food preparation facility, covered
9 under SIC Code 0273 (Animal Aquiculture) and SIC Code 2092 (Prepared Fresh or Frozen Fish
10 & Seafoods), is also required to be covered by the General Industrial Storm Water Permit,
11 NPDES Permit No. CA S000001, State Water Resources Control Board, Order No. 92-12-DWQ
12 as amended by Order No. 97-03-DWQ ("General Permit"). RIVER WATCH contends DBOC
13 has not obtained coverage under the General Permit. Failure to obtain coverage under the
14 General Permit is a violation of CWA § 402(p), 33 U.S.C. § 1342(p).

15 4. RIVER WATCH alleges DBOC illegally discharges to waters which are habitat for
16 threatened or endangered species as that term is defined by the California and United States
17 Environmental Protection Agency ("EPA").

18 5. Under 33 U.S.C. § 1251(e), Congress declared its goals and policies with regard to public
19 participation in the enforcement of the CWA. 33 U.S.C. §1251(e) provides, in pertinent part:

20 Public participation in the development, revision, and enforcement of any
21 regulation, standard, effluent limitation, plan or program established by the
22 Administrator or any State under this chapter shall be provided for, encouraged,
and assisted by the Administrator and the States.

23 6. RIVER WATCH seeks injunctive relief to prohibit future violations, civil penalties, a
24 bond to ensure the Facility and Drakes Estero are remediated, fees and cost and any other relief
25 necessary to remediate the harm.

26 **II. PARTIES TO THE ACTION**

27 7. Plaintiff CALIFORNIA RIVER WATCH is a 501(c)(3) nonprofit public benefit
28 corporation duly organized under the laws of the State of California, with headquarters and main

1 office located in Sebastopol, Sonoma County, California. The specific purpose of this
2 corporation is to protect, enhance, and help restore the surface and ground waters of California
3 including rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota,
4 flora and fauna. And to educate the public concerning environmental issues associated with these
5 environs. To further these goals, RIVER WATCH actively seeks federal and state agency
6 implementation of the Clean Water Act and other laws and, where necessary, directly initiates
7 enforcement actions on behalf of itself and its members.

8 8. Members of RIVER WATCH live in Marin County and use and enjoy the waters into
9 which DBOC has caused, is causing, and will continue to cause, pollutants to be discharged.
10 Members of RIVER WATCH have interests in Drakes Estero which interests have been, are
11 being, or may be adversely affected by DBOC's violations of the CWA as alleged in this
12 Complaint. Said members use the affected waters for recreation, sports, boating, kayaking,
13 swimming, hiking, photography, nature outings, and the like. The relief sought will redress the
14 injury in fact to RIVER WATCH and its members and the likelihood of future injury and
15 interference with the interests of said members.

16 9. Defendant KEVIN LUNNY is now, and at all times relevant to this Complaint was, an
17 individual residing in the State of California and the President, owner and operator of DRAKES
18 BAY OYSTER COMPANY.

19 10. Defendant DRAKES BAY OYSTER COMPANY, is now, and at all times relevant to
20 this Complaint was, a corporation organized under the laws of the state of State of California and
21 registered with the State of California, and doing business as an oyster farm and shellfish
22 processing Facility in Inverness, California.

23 11. Defendants DOES 1-30 Inclusive, respectively, are persons, partnerships, corporations
24 and entities, who are, or were, responsible for, or in some way contributed to, the violations
25 which are the subject of this Complaint or are, or were, responsible for the maintenance,
26 supervision, management, operations, or insurance coverage of the Facility and operations taking
27 place at the Facility as identified in the CWA NOTICE and this Complaint. The names,
28 identities, capacities, and functions of Defendants DOES 1 - 30, inclusive, are presently

1 unknown to RIVER WATCH. RIVER WATCH shall seek leave of court to amend this
2 Complaint to insert the true names of said DOES defendants when the same have been
3 ascertained.

4 **III. JURISDICTIONAL ALLEGATIONS**

5 12. Subject matter jurisdiction is conferred upon this Court by CWA § 505(a)(1), 33 U.S.C.
6 § 1365(a)(1), which states in part that, “any citizen may commence a civil action on his own
7 behalf against any person . . . who is alleged to be in violation of (A) an effluent standard or
8 limitation . . . or (B) an order issued by the Administrator or a State with respect to such a
9 standard or limitation.”

10 13. Members and supporters of RIVER WATCH reside in the vicinity of, derive livelihoods
11 from, own property near, and/or recreate on, in or near and/or otherwise use, enjoy and benefit
12 from the waterways and associated natural resources into which DBOC discharges pollutants,
13 or by which DBOC’s operations adversely affect said members’ interests, in violation of CWA
14 §§ 301(a) and 402(p), 33 U.S.C. §§ 1311(a), 1342(p). The health, economic, recreational,
15 aesthetic and environmental interests of RIVER WATCH and its members may be, have been,
16 are being, and will continue to be adversely affected by DBOC’s unlawful violations as alleged
17 herein. RIVER WATCH and its members contend there exists an injury in fact to them,
18 causation of that injury by DBOC’s complained of conduct, and a likelihood that the requested
19 relief will redress that injury.

20 14. Pursuant to CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), notice of the CWA
21 violations alleged in this Complaint was given more than sixty (60) days prior to commencement
22 of this lawsuit, to: (a) DBOC, (b) the United States EPA, Federal and Regional, and (c) the State
23 of California Water Resources Control Board.

24 15. Pursuant to CWA § 505(c)(3), 33 U.S.C. § 1365(c)(3), a copy of this Complaint has been
25 served on the United States Attorney General and the Administrator of the Federal EPA.

26 16. Pursuant to CWA § 505(c)(1), 33 U.S.C. § 1365(c)(1), venue lies in this District as the
27 Facility and the sites where illegal discharges occurred, which are the source of the violations
28 complained of in this action, are located within this District.

IV. GENERAL ALLEGATIONS

17. RIVER WATCH incorporates by reference all the foregoing including EXHIBIT A as though the same were separately set forth herein.

18. DBOC owns and operates the Facility located at 17171 Sir Francis Drake Boulevard in Inverness, California. The Facility is located within 100 feet of Drakes Estero – a water of the United States. The Facility consists of a retail shellfish sales facility, an oyster shucking and packing facility, an indoor oyster hatchery facility, two oyster outdoor seed setting tanks, and the placement of oyster cultivation apparatus including a seawater intake and discharge system with outfall pipes into Drakes Estero. The buildings, hatchery, seawater discharge system, and outfall pipes are all point sources. Materials from operations at the oyster shucking and shellfish packing facility containing biological waste such as shells, shellfish parts, unwanted shellfish and other pollutants such as bleach, ammonia, other cleaning solutions, as well as packaging wastes (plastic and paper), discharge from an outfall pipe directly into Drakes Estero. Materials from the oyster hatchery operations containing biological waste in the form of oyster shells, oysters, oyster waste, and single-cell algae used as oyster feed, in addition to water treatment pollutants such as chlorine and sodium hypochlorite, discharge from an outfall pipe directly into Drakes Estero.

19. DBOC has no permit for discharges from the Facility to Drakes Estero.

20. Information available to RIVER WATCH indicates the continued existence of unlawful discharges of a pollutant from point sources within the Facility into a water of the United States without a NPDES permit.

21. The Regional Water Quality Control Board has determined that the watershed areas and affected waterways identified in this Complaint and in EXHIBIT A are beneficially used for water contact recreation, non-contact water recreation, fish and wildlife habitat, preservation of rare and endangered species, fish migration, fish spawning, navigation, and sport fishing.

22. In addition to discharges of a pollutant from point sources, RIVER WATCH contends DBOC is discharging and helping to propagate *Didemnum vexillum* (“Dvex”) – a fast-growing sea squirt not native to Drakes Estero – from point sources within the Facility into Drakes

1 Estero. Dvex most likely arrived at Drakes Estero on shellfish stock, aquaculture equipment,
2 or boat hulls.

3 23. Once established in an ecosystem, Dvex can begin to take it over, crippling fisheries and
4 natural areas and causing significant ecological and economic damage. Dvex reproduces both
5 sexually and asexually. Dvex can shed eggs and sperm into water which then drift with the
6 currents but usually settle close to the parents. Dvex can also reproduce by fragmenting from
7 existing colonies and floating through currents to establish new colonies.

8 24. Drakes Estero consists of a flat muddy bottom with relatively few solid surfaces. As
9 such Dvex would normally be prohibited from growth. However, DBOC's infrastructure
10 provides the hard surfaces needed to support Dvex in the form of wooden oyster racks, boats,
11 hulls, docks, pilings and the oysters themselves.

12 25. Currently, 98% of the substrate harboring Dvex in Drakes Estero is owned by DBOC.

13 26. Since being established on these hard surfaces, Dvex has spread to the eelgrass and Estero
14 floor. Eelgrass is an ecosystem engineer filtering sediment out of the water, providing food to
15 many marine animals, and hosting as a nursery for species such as herring that lay eggs in the
16 eelgrass.

17 **V. STATUTORY BACKGROUND**

18 27. CWA §301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters
19 of the United States, unless such discharge is in compliance with various enumerated sections
20 of the CWA. Among other things, CWA § 301(a) prohibits discharges not authorized by, or in
21 violation of, the terms of a NPDES permit issued pursuant to CWA § 402, 33 U.S.C. § 1342.

22 28. CWA § 402(p), 33 U.S.C. § 1342(p), requires DBOC to apply for coverage under the
23 General Permit for its industrial storm water discharges from the Facility to Drakes Estero.

24 29. CWA § 502(6), 33 U.S.C. § 1362(6), defines a pollutant as "dredged spoil, solid waste,
25 incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological
26 materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and
27 industrial, municipal and agricultural waste discharged into water."
28

1 30. Pursuant to CWA § 402, 33 U.S.C. § 1342, the Administrator of the EPA has authorized
2 California's State Water Resources Control Board to issue NPDES permits.

3 31. CWA §§ 505(a)(1) and (f), 33 U.S.C. §§ 1365(a)(1) and (f) provide for citizen
4 enforcement actions against any "person, including individuals, corporations, or partnerships,
5 for violations of NPDES permit requirements and for unpermitted discharges of pollutants. An
6 action for injunctive relief under the CWA is authorized by CWA § 505(a), 33 U.S.C. § 1365(a).
7 Violators of the CWA are also subject to an assessment of civil penalties of up to \$37,500 per
8 day/per violation for all violations, pursuant to CWA §§ 309(d) and 505, 33 U.S.C. §§ 1319(d),
9 1365. *See also* 40 C.F.R. §§ 19.1-19.4.

10 32. The Regional Water Quality Control Board has established water quality standards for
11 Drakes Estero in the Water Quality Control Plan for the San Francisco Bay Basin, generally
12 referred to as the "Basin Plan." The Basin Plan includes a narrative toxicity standard which
13 states that "[a]ll waters shall be maintained free of toxic substances in concentrations that are
14 lethal or that produce other detrimental responses in aquatic organisms." The Basin Plan further
15 provides that "[w]aters shall not contain suspended material in concentrations that cause
16 nuisance or adversely affect beneficial uses.

17 33. The United States EPA adopted the National Toxics Rule ("NTR") on February 5, 1993
18 and the California Toxics Rule ("CTR") on May 18, 2000. *See* 40 C.F.R. part 131. When
19 combined with the beneficial use designations set forth in the Basin Plan, these Rules contain
20 water quality standards applicable to these discharges. On April 26, 2000 the State Water
21 Resources Control Board adopted the 'Policy for Implementation of Toxics Standard for Inland
22 Surface Waters, Enclosed Bays, and Estuaries of California,' which contains requirements for
23 implementation of the NTR and CTR. Pursuant to 40 C.F.R. part 131 "criteria" set forth in the
24 CTR, "[a]re legally applicable in the State of California for inland surface waters, enclosed bays
25 and estuaries for all purposes and programs under the Clean Water Act."

26 34. There is no per se exception from CWA regulations for facilities which have closed or
27 are no longer operational. An owner or operator of a facility or site within the designated SIC
28 codes must obtain permit coverage for discharges of storm water associated with industrial

1 activity even after the facility has ceased operations as long as significant materials remain and
 2 are exposed to storm water. 40 C.F.R. §§ 122.26(a), 40 C.F.R. § 122.22(b)(14). The EPA
 3 requires permit coverage until an owner or operator can “eliminate the storm water discharges
 4 associated with industrial activity from a facility.” 65 Fed. Reg. 64746, 64759 (October 30,
 5 2000) (National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector
 6 General Permit for Industrial Activities). Permit coverage is required until “the permittee has
 7 ceased operations at the facility and there no longer are discharges of storm water associated
 8 with industrial activity from the facility.” 65 Fed. Reg. at 64759. The State Water Resources
 9 Control Board requires that a closed facility must demonstrate it has eliminated pollutant
 10 exposure before a permit is no longer needed. California has consistently required industrial
 11 permit coverage at closed military bases until contaminants have been cleaned up.

12 35. The General Permit requires the implementation of best management practices (“BMPs”)
 13 that will reduce or eliminate discharges of pollutants from storm water. The General Permit also
 14 requires the preparation, implementation, review and update of an adequate Storm Water
 15 Pollution Prevention Plan (“SWPPP”), the elimination of all non-authorized storm water
 16 discharges, and the development and implementation of an adequate monitoring and reporting
 17 program for a facility and its operations. The SWPPP must identify potential pollutants on the
 18 site, the source of those pollutants, and the means to manage those sources to reduce storm water
 19 pollution. RIVER WATCH contends DBOC has not obtained coverage under the General
 20 Permit. Failure to obtain coverage under the General Permit is a violation of CWA § 402(p),
 21 33 U.S.C. § 1342(p).

22 **VI. CLAIMS FOR RELIEF**

23 **A. FIRST CLAIM FOR RELIEF**

24 **Violation of CWA § 301(a), 33 U.S.C. § 1311(a) – Violation of the Prohibition on the**
 25 **Discharge of Pollutants from Point Sources to Waters of the United States Without a**
 26 **NPDES Permit Issued under CWA § 402, 33 U.S.C. § 1342**

27 36. RIVER WATCH re-alleges and incorporates by reference the allegations of Paragraphs
 28 1 through 35 as though fully set forth herein including all allegations in the NOTICES. RIVER

1 WATCH is informed and believes, and on such information and belief alleges, as follows:

2 37. CWA § 301(a), 33 U.S.C. § 1331(a), prohibits the discharge of any pollutant from any
3 point source to waters of the United States, except for discharges in compliance with an NPDES
4 permit issued pursuant to CWA § 402, 33 U.S.C. § 1342.

5 38. DBOC discharges pollutants, such as biological materials and disinfectants from point
6 sources within the Facility such as the oyster racks, boats, the oysters themselves, and the outfall
7 pipe, into Drakes Estero, a water of the United States, without a NPDES permit.

8 39. RIVER WATCH is informed and believes, and thereupon alleges, that since the date that
9 DBOC began operations at the Facility to the present, DBOC has discharged and continues to
10 discharge pollutants without having obtained a NPDES permit as required by CWA § 301(a),
11 33 U.S.C. § 1311(a). Said discharges are therefore unlawful discharges of pollutants from point
12 sources into waters of the United States within the meaning of CWA § 301, 33 U.S.C. § 1311.

13 40. The violations of the CWA by DBOC as alleged herein are not wholly past violations, are
14 capable of repetition, and are therefore enforceable in this citizen suit action, because, inter alia,
15 these violations and other ongoing and continuous violations result from the same underlying,
16 and inadequately resolved causes.

17 **B. SECOND CLAIM FOR RELIEF**

18 **Violation of CWA § 402(p), 33 U.S.C. § 1342(p) – Failure to Comply with the Regulations**
19 **Setting Forth the Permit Application Requirements for Stormwater Discharges for**
20 **Industrial Discharge**

21 41. RIVER WATCH re-alleges and incorporates by reference the allegations of Paragraphs
22 1 through 40 as though fully set forth herein including all allegations in the NOTICES. RIVER
23 WATCH is informed and believes, and on such information and belief alleges as follows:

24 42. The CWA requires that a discharger involved with industrial activity obtain a NPDES
25 permit. CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). DBOC has not applied for coverage
26 under the General Permit, nor received a separate NPDES permit for its industrial discharges as
27 required by the CWA. DBOC has violated and continues to violate the CWA as evidenced by
28 its failure to comply with the regulations setting forth the permit application requirements for

1 stormwater discharges for industrial discharge.

2 43. As described in the NOTICES and herein, pursuant to CWA § 402(p), 33 U.S.C. §
3 1342(p), and 40 C.F.R. § 122.26, RIVER WATCH alleges DBOC to be in violation of an
4 effluent standard or limitation under the CWA and/or an order issued by the State with respect
5 to such standard to limitation.

6 44. By law and by the terms of the General Permit, violations of General Permit are violations
7 of the CWA. (40 C.F.R. § 122.41(a)).

8 45. DBOC's violations are ongoing, and will continue after the filing of this Complaint.
9 RIVER WATCH alleges herein all violations which may have occurred or will occur prior to
10 trial, but for which data may not have been available or submitted or apparent from the face of
11 the reports or data submitted by DBOC to the State Water Resources Control Board, the
12 Regional Water Quality Control Board, or to RIVER WATCH prior to the filing of this
13 Complaint. RIVER WATCH will amend this Complaint if necessary to address DBOC's State
14 and Federal violations of the General Permit which may occur after the filing of this Complaint.
15 Each of DBOC's violations in excess of State and Federal standards has been and is a separate
16 violation of the CWA.

17 46. RIVER WATCH alleges that without the imposition of appropriate civil penalties and the
18 issuance of appropriate equitable relief, DBOC will continue to violate the General Permit as
19 well as State and Federal standards with respect to the enumerated discharges as alleged herein
20 and described in the NOTICES. Further, that the relief requested in this Complaint will redress
21 the injury to RIVER WATCH and its members, prevent future injury, and protect the interests
22 of its members that are or may be adversely affected by DBOC's violations of the General
23 Permit.

24 47. RIVER WATCH alleges that continuing violations of the General Permit and the CWA
25 by DBOC at the Facility will irreparably harm RIVER WATCH and its members, for which
26 harm RIVER WATCH and its members have no plain, speedy or adequate remedy at law.

27 //

28 //

VII. RELIEF REQUESTED

RIVER WATCH respectfully requests that this Court grant the following relief:

48. Declare DBOC to have violated and to be in violation of the CWA as alleged herein;

49. Enjoin DBOC from discharging pollutants from the Facility and to the surface waters surrounding and downstream from the Facility until such time as DBOC has obtained a NPDES permit;

50. Order DBOC to pay civil penalties of \$37,500 per day/per violation for each violation of the Act pursuant to CWA §§ 309(d) and 505(a), 33 U.S.C. §§ 1319(d), 1365(a) and 40 C.F.R. §§ 19.1-19.4;

51. Order DBOC to take appropriate actions to restore the quality of United States waters impaired by its industrial activities at the Facility;

52. Order the setting of a bond to be posted by DBOC in sufficient amount to ensure cleanup, remediation and abatement of all impacts to and restoration of Drakes Estero;

53. Award RIVER WATCH its costs (including reasonable attorney, witness, and consultant fees) as authorized by CWA §505(d), 33 U.S.C. §1365(d); and,

54. Award any such other and further relief as this Court may deem appropriate.

DATED: February 5, 2014



JACK SILVER
Attorney for Plaintiff
CALIFORNIA RIVER WATCH

EXHIBIT A



290 South Main Street, #817 • Sebastopol, CA 95472 • US@ncriverwatch.org

***CERTIFIED MAIL -
RETURN RECEIPT REQUESTED***

June 24, 2013

Kevin J. Lunny
Drakes Bay Family Farms
Owners/Managing Agents
Drakes Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937

Re: Notice of Violations Under the Clean Water Act And Intent to File Suit

To: Owners and Managing Agents of Drakes Bay Oyster Company:

NOTICE

This Notice is provided on behalf of California River Watch (“River Watch”) in regard to violations of the Clean Water Act (“CWA”) 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at the Drakes Bay Oyster Company industrial facility located at 17171 Sir Francis Drake Boulevard in Inverness, California. Notice is being sent to you as the responsible owners, operators and/or managers of this facility. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from Drakes Bay Oyster Company into Drakes Estero.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under CWA § 505(a). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency (“EPA”), and the state in which the violations occur.

By this Notice, River Watch is providing statutory notification to Drakes Bay Oyster Company, hereafter referred to as the “Discharger” of continuing and ongoing violations of “an effluent standard or limitation”, and/or “an order issued by the Administrator or a State with respect to such standard or limitation” under CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1),

the Code of Federal Regulations, and the Regional Water Quality Control Board, San Francisco Bay Region's Water Quality Control Plan ("Basin Plan") as exemplified by the Discharger's illegal discharge of pollutants from a point source to waters of the United States without a National Pollution Discharge Elimination System ("NPDES") permit.

The CWA regulates the discharge of pollutants into navigable waters. The statute is structured in such a way that all discharge of pollutants is prohibited with the exception of several enumerated statutory exceptions. One such exception authorizes a polluter who has been issued a NPDES permit pursuant to the CWA, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards or limitations specified in a NPDES permit define the scope of the authorized exception to the CWA § 301(a), 33 U.S.C. § 1311(a) prohibition. Without a NPDES permit all surface and subsurface discharges from a point source to waters of the United States are illegal.

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation, or of an order with respect thereto, shall include sufficient information to permit the recipient to identify:

1. The specific standard, limitation, or order alleged to have been violated.

River Watch hereby notices the Discharger that it is not in possession of a NPDES permit allowing the discharge of pollutants from the Drakes Bay Oyster Company facility including numerous point sources within the facility site including the seawater intake and discharge system, outfall pipes, pump system, hatchery facility, and shellfish washing operations, to waters of the United States as required by CWA § 301(a), 33 U.S.C. § 1311(a), CWA §§ 402(a) and 402(b), 33 U.S.C. § 1342(a) and 1342(b).

The Discharger, operating as an animal aquiculture and shellfish food preparation facility, covered under SIC Code 0273 (Animal Aquaculture) and SIC Code 2092 (Prepared Fresh or Frozen Fish & Seafoods), is required to be covered by the General Industrial Storm Water Permit, NPDES Permit No. CA S000001, State Water Resources Control Board, Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ ("General Permit"). The General Permit requires the implementation of best management practices (BMPs) that will reduce or eliminate discharges of pollutants from stormwater. The General Permit also requires the preparation, implementation, review and update of an adequate Storm Water Pollution Prevention Plan ("SWPPP"), the elimination of all non-authorized storm water discharges, and the development and implementation of an adequate monitoring and reporting program for a facility and its operations. The SWPPP must identify potential pollutants on the site, the source of those pollutants, and the means to manage those sources to reduce storm water pollution.

River Watch contends the Discharger has failed and is failing to comply with the terms and conditions of the General Permit for the Drakes Bay Oyster Company facility. Failure to obtain coverage under the General Permit is a violation of CWA § 402(p), 33 U.S.C. § 1342(p).

2. The activity alleged to constitute a violation.

River Watch has set forth below narratives describing with particularity the activities leading to violations. In summary, the CWA requires that all discharges of pollution from a point source to a water of the United States without a NPDES permit are prohibited. River Watch alleges the Discharger is discharging pollutants including biological materials and polluted wastewater from the Drakes Bay Oyster Company facility and various point sources within the facility site, to waters of the United States, including Drake's Estero.

3. The person or persons responsible for the alleged violation.

The entity responsible for the violations alleged in this Notice is Drakes Bay Oyster Company identified throughout this Notice as the "Discharger".

4. The location of the alleged violation.

The location of the various violations alleged are identified in the BACKGROUND section of this Notice as well as in records either created or maintained by or for the Discharger with regard to the Drakes Bay Oyster Company facility in Inverness, California which relate to the Discharger's activities on the facility site.

5. The date or dates of violations or a reasonable range of dates during which the alleged activities occurred.

Disposition, discharge and release of pollutants from the Drakes Bay Oyster Company facility in Inverness has been ongoing for a number of years. The CWA is a strict liability statute with a 5-year statute of limitations; therefore, the range of dates covered by this Notice is June 24, 2008 through June 24, 2013. River Watch will from time to time supplement this Notice to include all violations which occur after the date of this Notice. The majority of the violations identified in this Notice such as discharging pollutants to waters of the United States without a NPDES permit, failure to obtain a NPDES permit, failure to implement the requirements of the CWA, and failure to meet water quality objectives are continuous, therefore each day is a violation.

Specific dates of violations are evidenced in the Discharger's own records (or lack thereof) or files and records of regulatory agencies including the Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB") and records found on the State Water Resources Control Board GeoTracker website related to the Inverness facility.

6. The full name, address, and telephone number of the person giving notice.

The entity giving notice is California River Watch, 290 S. Main Street, #817, Sebastopol, CA 95472 – a non-profit corporation organized under the laws of the State of California, dedicated to protect, enhance and help restore the groundwater and surface water environs of California including, but not limited to, its rivers, creeks, streams, wetlands, vernal pools, and tributaries.

River Watch may be contacted via email: US@ncriverwatch.org, or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

Sarah Danley, Esquire
California River Watch
290 South Main Street, #817
Sebastopol, CA 95472
Tel. 707-528-8175
Fax 707-528-8675

BACKGROUND

The Drakes Bay Oyster Company oyster farming facility and operations are located at 17171 Sir Francis Drake Boulevard in Inverness, California on the estuary known as Drakes Estero. Until 2004, Johnson Oyster Company operated a limited version of the mariculture facility now operated by the Discharger. The Discharger purchased the property on which the farming operations take place in 2004, and further developed the property including the installation of unpermitted buildings and structures, a retail shellfish sales facility, an oyster shucking and packing facility, an indoor oyster hatchery facility, two oyster outdoor seed setting tanks, and the placement of oyster cultivation apparatus including a seawater intake and discharge system with outfall pipes into Drakes Estero, a water of the United States. The buildings, hatchery, seawater discharge system, and outfall pipes are all point sources.

Materials from operations at the oyster shucking and shellfish packing facility containing biological waste such as shells, shellfish parts, unwanted shellfish and other pollutants such as bleach, ammonia, other cleaning solutions, as well as packaging wastes (plastic and paper), discharge from an outfall pipe directly into Drakes Estero.

Materials from operations at the oyster hatchery facility containing biological waste in the form of oyster shells, oysters, oyster waste, and single-cell algae used as oyster feed, in addition to water treatment pollutants such as chlorine and sodium hypochlorite, discharge from an outfall pipe directly into Drakes Estero.

River Watch members have a vital interest in bringing the Discharger's operation of its Inverness facility into compliance with the CWA. Without the implementation of the relief requested below, River Watch believes the adverse effects of the Discharger's violations of the General Permit and the CWA will continue.

VIOLATIONS

River Watch contends that between June 24, 2008 and June 24, 2013 the Discharger violated the CWA, the Basin Plan and the Code of Federal Regulations by discharging pollutants from the Drakes Bay Oyster Company facility in Inverness to waters of the United States without an individual NPDES permit, or in violation of the General Permit. Furthermore, River Watch contends these violations are continuing.

The violations as set forth in this Notice affect the health and enjoyment of members of River Watch who reside, work and recreate in the affected area. The members' health, use and enjoyment of this natural resource is specifically impaired by the Discharger's violations of the CWA as identified in this Notice.

REMEDIAL MEASURES REQUESTED

River Watch believes that implementation of the following remedial measures are necessary in order to bring the Discharger into compliance with the CWA and reduce the biological impacts of its non-compliance upon public health and the environment surrounding the Drakes Bay Oyster Company facility:

1. Application for an individual NPDES discharge permit or application for coverage under the General Permit;
2. Immediate cessation of all unpermitted discharges of pollutants including shells, shellfish parts, unwanted shellfish, bleach, ammonia, other cleaning solutions, packaging wastes (plastic and paper) oysters, oyster waste, single-cell algae used as oyster feed, chlorine, and sodium hypochlorite, from the Inverness facility.

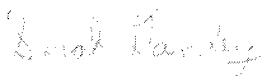
CONCLUSION

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under CWA § 505(a) against the Discharger for the violations identified herein.

During the 60-day notice period, River Watch is willing to discuss effective remedies for these violations. If the Discharger wishes to pursue such discussions, it is suggested that a dialog be initiated soon so that discussions may be completed before the end of the 60-day

notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when that notice period ends.

Very truly yours,



Sarah Danley

SD:lhv

cc: Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Regional Administrator
U.S. Environmental Protection Agency - Region 9
75 Hawthorne St.
San Francisco, CA 94105

Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812

Kevin John Lunny
Registered Agent
Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
Inverness, CA 94937

Ryan R. Waterman, Esq.
STOEL RIVES LLP
12255 El Camino Real, Suite 100
San Diego, CA 92130



290 South Main Street, #817 • Sebastopol, CA 95472 • US@ncriverwatch.org

***CERTIFIED MAIL -
RETURN RECEIPT REQUESTED***

August 6, 2013

Kevin J. Lunny
Drakes Bay Family Farms
Owners/Managing Agents
Drakes Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937

**Re: Supplemental Notice of Violations Under the Clean Water Act
And Intent to File Suit**

To: Owners and Managing Agents of Drakes Bay Oyster Company:

NOTICE

This Notice is provided on behalf of California River Watch ("River Watch") in regard to violations of the Clean Water Act ("CWA") 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at the Drakes Bay Oyster Company industrial facility located at 17171 Sir Francis Drake Boulevard in Inverness, California. Notice is being sent to you as the responsible owners, operators and/or managers of this facility. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from Drakes Bay Oyster Company into Drakes Estero.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under CWA § 505(a). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the state in which the violations occur.

By this Notice, River Watch is providing statutory notification to Drakes Bay Oyster Company, hereafter referred to as the "Discharger" of continuing and ongoing violations of "an effluent standard or limitation", and/or "an order issued by the Administrator or a State

with respect to such standard or limitation” under CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board, San Francisco Bay Region’s Water Quality Control Plan (“Basin Plan”) as exemplified by the Discharger’s illegal discharge of pollutants from a point source to waters of the United States without a National Pollution Discharge Elimination System (“NPDES”) permit.

The CWA regulates the discharge of pollutants into navigable waters. The statute is structured in such a way that all discharge of pollutants is prohibited with the exception of several enumerated statutory exceptions. One such exception authorizes a polluter who has been issued a NPDES permit pursuant to the CWA, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards or limitations specified in a NPDES permit define the scope of the authorized exception to the CWA § 301(a), 33 U.S.C. § 1311(a) prohibition. Without a NPDES permit, all surface and subsurface discharges from a point source to waters of the United States are illegal.

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation, or of an order with respect thereto, shall include sufficient information to permit the recipient to identify:

1. The specific standard, limitation, or order alleged to have been violated.

River Watch hereby notices the Discharger that it is not in possession of a NPDES permit allowing the discharge of pollutants from the Drakes Bay Oyster Company facility including numerous point sources within the facility site including the seawater intake and discharge system, outfall pipes, pump system, hatchery facility, and shellfish washing operations, to waters of the United States as required by CWA § 301(a), 33 U.S.C. § 1311(a), CWA §§ 402(a) and 402(b), 33 U.S.C. § 1342(a) and 1342(b).

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River Watch contends the Discharger has failed and is failing to comply with the terms and conditions of the General Permit for the Drakes Bay Oyster Company facility. Failure to obtain coverage under the General Permit is a violation of CWA § 402(p), 33 U.S.C. § 1342(p).

2. The activity alleged to constitute a violation.

River Watch has set forth below narratives describing with particularity the activities leading to violations. In summary, the CWA requires that all discharges of pollution from a point source to a water of the United States without a NPDES permit are prohibited. River Watch alleges the Discharger is discharging pollutants including biological materials and polluted wastewater from the Drakes Bay Oyster Company facility and various point sources within the facility site, to waters of the United States, including Drake's Estero.

3. The person or persons responsible for the alleged violation.

The entity responsible for the violations alleged in this Notice is Drakes Bay Oyster Company identified throughout this Notice as the "Discharger".

4. The location of the alleged violation.

The location of the various violations alleged are identified in the BACKGROUND section of this Notice as well as in records either created or maintained by or for the Discharger with regard to the Drakes Bay Oyster Company facility in Inverness, California which relate to the Discharger's activities on the facility site.

5. The date or dates of violations or a reasonable range of dates during which the alleged activities occurred.

Disposition, discharge and release of pollutants from the Drakes Bay Oyster Company facility in Inverness has been ongoing for a number of years. The CWA is a strict liability statute with a 5-year statute of limitations; therefore, the range of dates covered by this Notice is August 1, 2008 through August 1, 2013. River Watch will from time to time supplement this Notice to include all violations which occur after the date of this Notice. The majority of the violations identified in this Notice such as discharging pollutants to waters of the United States without a NPDES permit, failure to obtain a NPDES permit, failure to implement the requirements of the CWA, and failure to meet water quality objectives are continuous, therefore each day is a violation.

Specific dates of violations are evidenced in the Discharger's own records (or lack thereof) or files and records of regulatory agencies including the Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB") and records found on the State Water Resources Control Board GeoTracker website related to the Inverness facility.

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River Watch may be contacted via email: US@ncriverwatch.org, or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

Sarah Danley, Esquire
P.O. Box 5469
Santa Rosa, CA 95402-5469
Tel. 707-528-8175
Fax 707-528-8675

BACKGROUND

The Drakes Bay Oyster Company oyster farming facility and operations are located at 17171 Sir Francis Drake Boulevard in Inverness, California on the estuary known as Drakes Estero. Until 2004, Johnson Oyster Company operated a limited version of the mariculture facility now operated by the Discharger. The Discharger purchased the property on which the farming operations take place in 2004, and further developed the property including the installation of unpermitted buildings and structures, a retail shellfish sales facility, an oyster shucking and packing facility, an indoor oyster hatchery facility, two oyster outdoor seed setting tanks, and the placement of oyster cultivation apparatus including a seawater intake and discharge system with outfall pipes into Drakes Estero, a water of the United States. The buildings, hatchery, seawater discharge system, and outfall pipes are all point sources.

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In addition, River Watch contends the Discharger is discharging *Didemnum vexillum*, (“D. vex”) from point sources within the Drakes Bay Oyster Company site into Drakes Estero, and is helping to propagate D. vex. Currently, 98% of the substrate harboring D. vex in Drakes Estero is owned by the Discharger.

D. vex is a fast-growing sea squirt non- native to the Estero, more than likely arriving from shellfish stock, aquaculture equipment, or boat hulls. Once established in an ecosystem, D. vex can begin to take over and cause crippling of fisheries and significant ecological and economic damage. D. vex reproduces both sexually and asexually; shedding eggs and sperm into the water which drift with the currents but usually settle close to the parents.

Drakes Estero has a flat, muddy bottom with relatively few solid surfaces onto which D. vex would normally be unable to grow. However, the Discharger’s infrastructure provides the hard surfaces and habitat D. vex needs in the form of wooden oyster racks, boats, hulls, docks, pilings and the oysters themselves – all point sources. Oyster shells and wooden oyster racks containing D. vex are pulled up onto boats, dislodging D. vex which breaks off into fragments which can then establish new colonies in the area. When the oysters are processed, fragments of D. vex are discharged from the outfall back into Drakes Estero which also can allow the fragments to form new colonies. These fragments discharged from the Discharger’s operations are biological waste and therefore pollutants under the CWA. Since being established on these hard surfaces within the Drakes Bay Oyster Company site, D. vex has spread to the eelgrass and the Estero floor. Eelgrass is an ecosystem engineer, filtering sediment out of the water, and providing food to many marine animals. It provides a nursery for herring and other like species which lay their eggs in the eelgrass. The eelgrass may be at risk for being smothered by D. vex.

River Watch members have a vital interest in bringing the Discharger’s operation of its Inverness facility into compliance with the CWA. Without the implementation of the relief requested below, River Watch believes the adverse effects of the Discharger’s violations of the General Permit and the CWA will continue.

VIOLATIONS

River Watch contends that between August 1, 2008 and August 1, 2013 the Discharger violated the CWA, the Basin Plan and the Code of Federal Regulations by discharging pollutants from the Drakes Bay Oyster Company facility in Inverness to waters of the United States without an individual NPDES permit, or in violation of the General Permit. Furthermore, River Watch contends these violations are continuing.

The violations as set forth in this Notice affect the health and enjoyment of members of River Watch who reside, work and recreate in the affected area. The members’ health, use and enjoyment of this natural resource is specifically impaired by the Discharger’s violations of the CWA as identified in this Notice.

REMEDIAL MEASURES REQUESTED

River Watch believes that implementation of the following remedial measures are necessary in order to bring the Discharger into compliance with the CWA and reduce the biological impacts of its non-compliance upon public health and the environment surrounding the Drakes Bay Oyster Company facility:

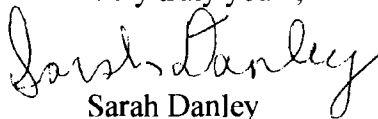
1. Application for an individual NPDES discharge permit or application for coverage under the General Permit;
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CONCLUSION

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under CWA § 505(a) against the Discharger for the violations identified herein.

During the 60-day notice period, River Watch is willing to discuss effective remedies for these violations. If the Discharger wishes to pursue such discussions, it is suggested that a dialog be initiated soon so that discussions may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when that notice period ends.

Very truly yours,



Sarah Danley

SD:lhmm

cc: Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

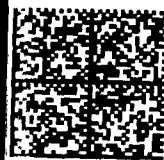
Regional Administrator
U.S. Environmental Protection Agency - Region 9
75 Hawthorne St.
San Francisco, CA 94105

Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812

Kevin John Lunny
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Drakes Bay Oyster Company
17300 Sir Francis Drake Blvd.
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12255 El Camino Real, Suite 100
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FEB 18 2014
DOJ MAILROOM

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U.S. Dept. of Justice
Environmental & Natural Resource Division
Law and Policy Section
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Ben Franklin Station
Washington, DC 20044-7415

